89-1766

Supreme Court, U.S.
FILED
JUN 11 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. [redacted]

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, UNION NO. 1149 and RICK ANDERSON,
Petitioners,

v.

SEAVIEW INDUSTRIES, INC., A California Corporation,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of California First Appellate District

---

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DAVID A. ROSENFELD
Counsel of Record
VAN BOURG, WEINBERG, ROGER & ROSENFELD
875 Battery Street, 3rd Floor
San Francisco, CA 94111
(415) 864-4000
Attorneys for Petitioners United Brotherhood of Carpenters and Joiners of America, Union No. 1149 and Rick Anderson

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Cases — Page

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) 2

Lingle v. Norge Division of Magic Chef, 486 U.S. —— (1988) 2

Linn v. Plant Guard Workers Local 114, 383 U.S. 53 (1966) 1

Lowe Excavating v. Operating Engineers, 535 N.E. 2d 1005 (Ill. App. Ct. 1989), cert. denied, —— U.S. —— (1989) 3

Old Dominion Branch No. 496 v. Austin, 418 U.S. 264 (1974) 1

United Steel Workers of America v. Rawson, —— U.S. —— (1990) 2, 3, 4, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1760

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, UNION NO. 1149 and RICK ANDERSON,
Petitioners,

v.

SEAVIEW INDUSTRIES, INC., A California Corporation,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of California First Appellate District

---

SUPPLEMENT BRIEF IN SUPPORT OF SUPPLEMENTAL BRIEF IN SUPPORT OF

In our Petition we demonstrated that there are two lines of cases which this Court has decided which have collided and caused widespread conflict between the state courts as to the treatment of defamation in the context of enforcing collective bargaining agreements. This Court's decisions with respect to defamation, *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53 (1966) and *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974), were decided outside the context of the en-

forcement of a collective bargaining agreement. In opposition to these cases are those in which this Court has held that Section 301 preempts state law claims in the context of the consideration of the terms of the labor contract. See *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) and *Lingle v. Norge Division of Magic Chef*, 486 U.S. —— (1988).

In our Petition we have shown that many state courts have held that there is an absolute privilege which attaches to the enforcement of collective bargaining agreements. Opposed to these courts are a number of courts which have held, to the contrary, that there is only a qualified privilege. In addition, while at least one federal circuit has adopted the absolute privilege standard, others have applied the qualified privilege standard. It is because of this pervasive conflict in an area where there is repeated litigation that we ask that this Court grant a plenary review of this issue.

The day before our Petition for Writ of Certiorari was filed, this Court issued its opinion in *United Steel Workers of America v. Rawson*, —— U.S. —— (1990). We file this supplemental brief because we believe that *Rawson* supports our Petition and requires summary disposition or, in the alternative, a remand so that the court below may take into consideration *Rawson*.

In *Rawson* the individuals argued that state law imposed obligations on the union with respect to its alleged negligent inspection of a mine where there was an accident causing the death of a number of miners. Those individuals sought to avoid the pre-emptive force of Section 301, 29 U.S.C. § 185, by characterizing their tort claim as sufficiently independent of the collective bargaining agreement. This Court rejected that argument.

Consistent with prior cases, this Court re-stated the proposition "that the pre-emptive force of § 301 extends beyond state-law contract actions." Because the Supreme

Court of Idaho had attempted to characterize liability under state law as negligent inspection by the union, rather than any duty imposed by the collective bargaining agreement, this Court was faced with the question of whether a state law tort could survive the existence of the collective bargaining agreement and § 301 pre-emption. This Court held that § 301 pre-emption governed because the "tort claim cannot be described as independent of the collective-bargaining agreement."

In this case we advance a more compelling argument that the claim of Seaview is wholly dependent upon the collective bargaining agreement. It is dependent for two reasons:

First, it is dependent because the collective bargaining agreement itself defined the conditions under which Seaview could perform as a subcontractor to Southwest Marine. Precisely, the subcontracting clause prohibited Southwest Marine from permitting Seaview to perform unless it paid "not less than the wage and conditions provided for in [the] Agreement." (See Petition, p. 5) This language in the collective bargaining agreement squarely governed the relationship between Southwest and Seaview.[1] Thus, the primary determination to be made by the court below will be the determination as "to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches with that agreement . . ." (*Rawson*, —— U.S. at ——.)

Second, the alleged defamation arose in the context of the union's attempt to enforce the collective bargaining

---

[1] This case is distinguishable from *Lowe Excavating v. Operating Engineers*, 535 N.E. 2d 1005 (Ill. App. Ct. 1989), cert. denied, —— U.S. —— (1989). In that case, there was no collective bargaining agreement which defined the duties of the parties for the union was engaged in picketing to obtain a contract. The Illinois Appellate Court expressly recognized this distinction and refused to apply any pre-emption because of the non-existence of a collective bargaining agreement.

agreement. As we have demonstrated in our Petition, Section 301 pre-emption extends to protect the union's efforts to enforce the collective bargaining agreement through the filing and processing of grievances. As we pointed out, some courts have held that there is an absolute privilege to communications made in the course of the grievance procedure. Other courts, to the contrary, have held that only a qualified privilege exists. It is this conflict which petitioners believe this Court needs to resolve. Moreover, the necessity of applying the absolute privilege and of applying Section 301 pre-emption becomes predominant where the entire dispute *is* the meaning of the underlying collective bargaining agreement.[2]

Rawson, therefore, stands for the proposition that state law safety claims do not overcome § 301 pre-emption where it is necessary to interpret the terms of a collective bargaining agreement. Here, that interest is doubly implicated both because of the necessity to interpret the language of the subcontracting clause, but also because of the unwarranted interference in the processing of grievances and the arbitration procedure.

For the reasons stated in our Petition, as well as in this Supplemental Brief, this Court should either grant the Petition for Writ of Certiorari and set the matter down for plenary consideration or summarily grant the

---

[2] In many defamation cases, the alleged slander arose out of comments made about individuals or entities during the course of the processing of the grievance procedure. Determining whether the statements were slanderous would not necessarily involve any interpretation of the agreement. Nonetheless, slander was held pre-empted in order to protect the grievance procedure, not to protect the language of the collective bargaining agreement from inconsistent state interpretations. Here, we seek not only to protect the grievance procedure, but also to enforce the application of uniform federal law with respect to the meaning of the subcontracting clause, particularly in light of the extensive regulation of subcontracting clauses under 29 U.S.C. Section 158(e).

Petition, reverse and remand for further consideration in light of *Rawson*.

Respectfully submitted,

DAVID A. ROSENFELD
Counsel of Record
VAN BOURG, WEINBERG,
ROGER & ROSENFELD
875 Battery Street, 3rd Floor
San Francisco, CA 94111
(415) 864-4000
Attorneys for Petitioners United Brotherhood of Carpenters and Joiners of America, Union No. 1149 and Rick Anderson

June 11, 1990